FILED

No. 97-174 JUL 8 1997

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; Glen Witham, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

*Petitioners,*

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


Office of Cass County Attorney

EARL E. MAUS
Cass County Attorney
*Counsel of Record*
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
*Counsel for Petitioners*

*Of Counsel:*

JAMES W. NEHER
Assistant Attorney General
State of Minnesota



COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831


88 pp

## QUESTION PRESENTED

Under the decision of this Court in Yakima *County v. Yakima Indian Nation*, 502 U.S. 251 (1992), is land originally patented by the United States Government, and subsequently reacquired in fee simple by an Indian band, subject to state and local government taxation if it remains freely alienable, irrespective of the statute or treaty under which it was originally conveyed?

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1-29, *infra*) is reported at 108 F.3d 820. The opinion of the district court (App. 30-49, *infra*) is reported at 908 F. Supp. 689.

## JURISDICTION

The court of appeals entered its judgment on March 6, 1997 (App. 2, *infra*), and petitioners' petition for rehearing was denied by order dated April 9, 1997 (App. 50, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1996).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6; Nelson Act of 1889, ch. 24, 25 Stat. 642, §§ 3, 5 and 6; Burke Act of 1906, 25 U.S.C. § 349 (1996).

## STATEMENT OF THE CASE

Respondent Leech Lake Band of Chippewa Indians ("the Band") brought this action for declaratory and injunctive relief against Petitioners[1] ("Cass County" or "the county") in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, 2201 and 2202; 25 U.S.C. § 177; and 42 U.S.C. § 1983.

The issue in the district court case was whether certain lands originally patented by the federal government in fee, which have been reacquired by the Band, are subject to ad valorem taxation by the county. The lands in question were originally patented under three different provisions: (1) pursuant to the Nelson Act of 1889, 25 Stat. 642, "in conformity with" the General Allotment Act of 1887, 24 Stat. 388 ("the GAA") (thirteen parcels) (App. 61); (2) sold as pine lands pursuant to the Nelson Act (seven parcels) (App. 62); or (3) sold pursuant to the Homestead Act under the authority of the Nelson Act (one parcel) (App. 62-3).

Cross motions for summary judgment were filed by the parties, and the district court granted Cass County's motion. In granting the county's motion the court relied primarily on the decision of this Court in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), which held that lands allotted to individual Indians under the GAA, and subsequently reacquired in fee by individual

[1] The Petitioners include Cass County, Minnesota, and eight county officials.



Indians and the Yakima Nation itself, are subject to taxation by Yakima County, Washington. App. 37-8. In reaching its decision, the district court held that *Yakima* stands for the proposition that alienable lands originally patented by the federal government in fee, which have subsequently been reacquired by a tribe, remain freely alienable and therefore subject to ad valorem taxation. App. 46. Specifically, the district court relied on *Yakima* for its determination that Congress signaled its consent to taxation of the allotted lands through section 5 of the GAA, which rendered the allotted lands alienable and encumberable. App. 36-7. The district court explained:

> In holding the Yakima Nation land subject to state taxation, the Supreme Court discussed §§ 5 and 6 of the GAA and its prior decision in *Goudy v. Meath*, 203 U.S. 146 (1906). However, it appears the Court relied on § 5 and the *Goudy* decision. In *Goudy*, the Supreme Court held that an Indian who was himself an allottee of land under the Treaty of December 26, 1854, 10 Stat. at L. 1132, was personally liable for property taxes assessed by the State of Washington. *Goudy*, 203 U.S. at 150. According to the *Yakima* court, it was the alienability of the Indian land in *Goudy* which rendered it subject to taxation. *Yakima*, 502 U.S. at 263. In *Yakima*, the court held that alienability was a consequence of § 5 of the GAA and, as a result, "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64.

In concluding that the decision of this Court in *Yakima* was grounded on section 5 (App. 59), rather than on section 6, of the GAA, as amended by the Burke Act

(App. 64), the district court relied on the statement in the *Yakima* opinion to the effect that the Burke Act amendment to section 6 (the "Burke Act proviso"), which removed "all restrictions as to sale, incumbrance or taxation" of "prematurely" patented land, "reaffirmed" for such land "what section 5 of the GAA implied with respect to patented land generally: subjection to real estate taxes." App. 37. As a "reaffirmation" of taxability, the district court concluded that section 6, as amended by the Burke Act proviso, was considered by this Court to be unnecessary to its holding of taxability.[2] App. 37-8.

The court of appeals, in a two-to-one majority decision, affirmed in part and reversed in part the decision of the district court. The majority decision held that the thirteen parcels allotted under section 3 of the Nelson Act, which incorporated the allotment provisions of the GAA, were subject to taxation; but that the seven parcels originally sold as pine lands (sections 4 and 5 of the

---

[2] While the district court acknowledged that it was "difficult" to reconcile the general requirement that Congress "clearly manifest" its intention to allow taxation with the *Yakima* Court's statement that section 5 "implied" taxability, the court concluded that alienability is the "touchstone" for taxability. App. 37. The district court did, however, provide an "alternative holding" which would subject to taxation the thirteen parcels allotted under section 3 of the Nelson Act, which "inarguably" incorporated into its provisions the allotment provisions of the GAA, but would hold exempt the eight parcels which originally were sold by the federal government under the pine land provisions of the Nelson Act (sections 4 and 5) and the Homestead Act in accordance with section 6 of the Nelson Act. App. 47-8. This "alternative holding" provided by the district court is the same as the actual decision of the Court of Appeals.



Nelson Act) and the single parcel sold under the Homestead Act (section 6 of the Nelson Act) were exempt from taxation. App. 22-3. The court set out three interrelated bases for its decision.

First, the court stated that Cass County's position that the pine lands and homestead parcels are subject to taxation is incorrect because, in adopting an "alienability equals taxability" analysis, it fails to give due consideration to the rule established by Supreme Court precedent that Congress must provide its "unmistakably clear intent" to allow "state taxation of Indians or their property." App. 12. That error occurs, the court of appeals stated, in relying primarily on section 5 of the GAA dealing with alienability of the allotted lands, while disregarding the import of the Burke Act proviso in section 6 which, in the words of the court, was referred to repeatedly by this Court in *Yakima* "as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." App. 12-13. Thus, the court of appeals reasoned that *Yakima* should be read to have based its holding of taxability on the Burke Act proviso, which would permit taxation of only those lands patented by the federal government under the allotment provisions of the GAA (which does not include the pine land and homestead parcels).

Second, the court of appeals stated that "the County's reading of *Yakima* also disregards" the Court's conclusion in that case that "the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied [on sales of reservation land] by Yakima County." App. 13. The court of appeals considered that distinction significant because, in its view, if the *Yakima* Court had

considered alienability to mandate taxability, it would have sustained the excise tax as well as the ad valorem tax. *Id.* Thus, under the reasoning of the court of appeals, since the *Yakima* Court found that the Burke Act proviso authorized assessment of the ad valorem, but not the excise tax, it must be a prerequisite to assessment of the ad valorem tax. And the court reasoned further that, since the proviso does not apply to the pine land and homestead parcels which originally were patented by the federal government pursuant to laws other than allotment under the GAA (as adopted by the Nelson Act), those parcels must be exempt from ad valorem taxation.

Finally, the court of appeals noted that the *Yakima* Court, after holding that the land in question was taxable under the GAA, remanded the case based on the Yakima Nation's assertion that it was "not clear whether the parcels at issue . . . were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act." 502 U.S. at 270. The court concluded that the remand was an indication that the *Yakima* decision did not equate alienability with taxability, because if that were the case "it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation." App. 14.

## REASONS FOR GRANTING THE PETITION

This case presents a question on which there is a split among the circuits requiring resolution by this Court. The decision below conflicts with a decision of the Ninth



Circuit on the issue of whether "alienability equals taxability." And the Sixth Circuit is also in conflict with the Ninth Circuit on that issue. This split among the circuits, on an important issue that can arise in many states, casts doubt on the authority of states and their local government units to tax freely alienable land owned by Indian tribes. Since the issue has been fully explored by the three circuit courts that have addressed it, there is no need for this court to allow it to further percolate in the lower courts before resolving it.

### I. There Is A Split In Circuit Court Authority On The Issue Of Whether Freely Alienable Land Owned By An Indian Tribe Is Subject To State And Local Government Taxation.

In the decision below the Eighth Circuit held that certain of the land parcels at issue in this case, notwithstanding that they are freely alienable by the Band, are not subject to ad valorem taxation because they were not originally patented under the GAA. This holding is in direct conflict with the ruling of the Ninth Circuit in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994), that alienable land owned by an Indian tribe is taxable irrespective of how it was originally patented by the federal government.

In *Lummi* the Ninth Circuit considered an appeal by the Tribe from a summary judgment order denying it declaratory and injunctive relief from the assessment and collection of Washington's ad valorem property tax. The land in question was originally allotted by the federal

government in 1884 under the Treaty of Point Elliott,[3] and reacquired by the Tribe in fee simple in the 1970's and early 1980's. *Id.* at 1356-57. In its lawsuit the Tribe claimed that the land was exempt from taxation because it had originally been allotted "under the Treaty of Point Elliott rather than the General Allotment Act, which permits such taxation." *Id.* at 1356, The Ninth Circuit, in a two-to-one majority decision, affirmed the holding of the district court that the land, because it was freely alienable by the Tribe,[4] was subject to taxation under the *Yakima* decision. The court said in part:

> A state cannot tax reservation lands or reservation Indians unless Congress has " 'made its intention to [authorize state taxation] unmistakably clear.' " [*Yakima*] at ___, 112 S. Ct. at 688 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S. Ct. 2399, 2402, 85 L.Ed.2d 753 (1985)). In *Yakima Nation*, the Court found an unmistakably clear intent to tax fee-patented land. It did

[3] The Treaty of Point Elliott, a compact between numerous tribes and bands of Indians in Northern Puget Sound, created the Lummi Indian Reservation in 1855. The Treaty authorized the subdivision of the Reservation into land parcels which could be assigned to individuals or families. *Id.* at 1356.

[4] The tribe also contended in *Lummi* that the land in question was inalienable under the Indian Nonintercourse Act, 25 U.S.C. § 177. The court held that the applicable decisional and statutory authority establishes that "once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." 5 F.3d at 1359. In this case, the Eighth Circuit stated that it was unnecessary to consider the Nonintercourse Act since the case turned on whether there was an expression of unmistakably clear congressional intent to allow taxation of the parcels in question. App. 15.



> not rely on section 6 of the General Allotment Act as Yakima County proposed [footnote omitted], concluding instead that the land's alienable status determines its taxability. See *id.* at ___, 112 S. Ct. at 688-691. The Court made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints against alienation expire.

*Id.* at 1357. The *Lummi* majority also noted that the *Yakima* Court discussed its decision in *Goudy v. Meath*, 203 U.S. 146 (1906), citing that case as authority "for the proposition that alienable land is taxable unless explicitly exempted." *Id.* at 1358. Thus, the decision of the Eighth Circuit in this case, holding that land owned in fee by an Indian tribe is not subject to taxation solely as a result of its free alienability, is in direct conflict with the *Lummi* decision holding, in effect, that "alienability equals taxability."

The third decision contributing to the split among the circuits is *Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997). *Saginaw* involved land parcels originally allotted in 1864 under a treaty between the United States and the Chippewa Tribe, which were subsequently repurchased by both the Tribe and individual members of the Tribe. The Sixth Circuit, by a unanimous panel, reversed the district court and held that the parcels in question, though freely alienable, were not subject to

ad valorem taxation by the State of Michigan or its political subdivisions.[5] *Id.* at 131-32.

The basis for the *Saginaw* panel's holding was its conclusion that this Court's decision in *Yakima* was grounded not on section 5 of the GAA dealing with the alienability of the land allotted under the Act, but on the Burke Act proviso amending section 6 of the Act. That proviso permitted the Secretary of the Interior, in his discretion, to issue fee patents prior to expiration of the general twenty-five year trust period set out in the GAA, and provided that, following the issuance of such a "premature" patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Id.* at 133. The *Saginaw* panel determined that the Burke Act proviso applied to all lands allotted under the GAA (both before and after expiration of the twenty-five year trust period), and was necessary to this Court's holding of taxability in *Yakima*. For that reason, the court concluded that, since lands conveyed under the GAA are subject to taxation "only because of the explicit language of the Burke Amendment," the *Yakima* decision cannot be extended to lands originally patented under other laws or treaties solely on the basis that they are alienable. *Id.* at 133-34.

Thus, both the Eighth Circuit decision in this case and the Sixth Circuit decision in *Saginaw* are in direct conflict with the Ninth Circuit decision in *Lummi*. This split among the circuits regarding the applicability of the

---

[5] The State of Michigan has filed a Petition for a Writ of Certiorari in the *Saginaw* case. *State of Michigan, et al. v. United States of America and Saginaw Indian Tribe of Michigan.* Docket No. 97-14 (filed June 30, 1997).



*Yakima* decision to tribal lands patented under laws and treaties other than the GAA, which bears directly on the question of whether the free alienability of tribal land mandates its taxability, foreshadows an increase in conflicting interpretations of *Yakima* as this taxability issue is litigated in other circuits.

## II. The Applicability Of The *Yakima* Decision To The Taxability Of Tribal Land Raises An Important Question.

In light of the split among the circuits regarding the correct interpretation of the *Yakima* decision, as well as the likelihood that the question will arise in the context of future acquisitions by tribes of lands originally allotted under a variety of laws and treaties, the applicability of that decision to the taxability of tribal lands raises an important question requiring resolution. It is inevitable, as a result of the conflicting interpretations of *Yakima's* import among the three circuits, and the large number of tribal land transactions taking place across the country, that additional litigation on the question presented will develop in the future. Considering the thorough analysis of this important issue in three Court of Appeals decisions, two of which included dissents, there is no need for this Court to await additional decisions before resolving this conflict among the circuits. Moreover, the question of taxability versus exemption with respect to tribal lands is one of financial significance to both the states and the tribes. Thus, there is an urgent need for this Court's guidance to provide certainty regarding the extent of a state's power under the *Yakima* decision to impose a property tax on freely alienable tribal land.

## III. The Decision Of The Court Of Appeals Is Erroneous.

A further reason to grant the petition is that the decision of the Court of Appeals is erroneous because it is not in accord with this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

### A. The Decision In *Yakima* That Fee-Patented Land Is Subject To Ad Valorem Taxation Is Grounded On The Alienability Of The Land, Not On The Burke Act Proviso.

Cass County does not contend that the Burke Act proviso is wholly irrelevant to the question presented in this case. The *Yakima* opinion recognized that the proviso provides "express authority for taxation of fee-patented land." 502 U.S. at 258. This Court noted, however, that in *Goudy v. Meath*, 203 U.S. 146, 149 (1906), the Court held that Indian allottees became subject to state tax laws under section 6 of the GAA upon expiration of the twenty-five year trust period "without even mentioning the Burke Act proviso." *Id.* Further, the *Yakima* Court, in placing the *Goudy* decision in perspective, made it clear that that decision was not grounded on section 6 of the GAA, even without consideration of the Burke Act proviso. The Court said:

> *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.



> . . .
>
> Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

*Id.* at 263-64 (emphasis by Court; footnotes omitted). With respect to the Burke Act proviso itself, which permitted issuance of fee patents to certain allottees prior to expiration of the twenty-five year trust period prescribed under the GAA, but which did not subject an allottee to *plenary* state jurisdiction, the Court stated that the fact the proviso freed the land of "all restrictions as to sale, incumbrance or taxation," merely "*reaffirmed* for such 'prematurely' patented land what section 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.* at 264 (emphasis added; footnote omitted).

As a further clarification of its decision, the Court, apparently in response to an expression of concern by *Amicus Curiae* United States, made it clear that, as to the question of taxability, it was of no moment whether land was originally patented in fee pursuant to section 5 of the GAA (after expiration of the twenty-five year trust period) or pursuant to the Burke Act proviso as "prematurely" patented land. The Court said:

> Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee-patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant

> to the proviso, rather than at the expiration of the trust periods. . . . " Brief for United States as *Amicus Curiae* 13, n. 10.

*Id.* at 264, n.4.

To summarize, freely alienable tribal land is subject to ad valorem taxation irrespective of how it was originally patented; and it is clear that this Court, in arriving at its decision in *Yakima*, did not consider the Burke Act proviso necessary to its holding of taxability.

### B. The Eighth Circuit Decision Erroneously Concluded That This Court Considered The Burke Act Proviso Necessary To Its Decision In *Yakima*, And That The Decision Cannot Be Read To Hold That Fee-Patented Land Is Taxable By Reason Of Its Alienability Alone.

Notwithstanding the express language in *Yakima* to the effect that the Court's holding of taxability was grounded on the alienability of the lands at issue in that case, the Eighth Circuit majority opinion erroneously determined that the pine land and homestead parcels, having been patented under laws other than the GAA containing the Burke Act proviso, were exempt from taxation.

The thrust of the majority's reasoning in arriving at its decision is that: (1) this Court has established the longstanding rule that a state cannot tax Indians or their property unless Congress has given its permission to do so in unmistakably clear terms; (2) the *Yakima* Court's reference to the alienability of the lands at issue in that case can be read only to "imply" permission to tax, falling



short of the required "unmistakably clear" language; and (3) the Burke Act proviso grants permission to tax with the requisite clarity and is therefore the provision in the GAA upon which this Court based its holding in *Yakima*. App. 12-13.

While it is true that this Court has consistently declined to permit state taxation of Indians or their property absent a finding of "unmistakably clear" congressional authorization, 502 U.S. at 688, it is apparent that the Court found such authorization in section 5 of the GAA, as discussed in the *Goudy* decision. In clarifying the holding in *Goudy*, the Court said in *Yakima*:

> As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.*, at 149, 27 S. Ct. at 50, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.*

*Id.* at 263. The only reasonable interpretation of this statement, as with the other quotes from *Yakima* discussed above, is that the Court has concluded that the release of restrictions on alienability is a sufficiently clear indication, absent an express exemption, of Congress' permission to tax.[6]

---

[6] It is noteworthy that the dissent in *Yakima* considered the majority's decision to be based on the section 5 alienability provisions, not on the Burke Act proviso. 502 U.S. at 272-73 (Blackmun, J., concurring in part and dissenting in part).

The court of appeals, however, interpreted *Yakima* as holding that, without the Burke Act proviso, taxation of the land in that case would not have been allowed. In quoting from the *Yakima* decision, 502 U.S. at 259, to the effect that this Court considered the Burke Act proviso to indicate "a clear intention to permit" state taxation of the land in question, the court of appeals takes that language as a statement by the Court that the proviso is the *required* source of congressional permission to tax. App. 15-16. Viewing the Court's discussion of the proviso in the context of the entire *Yakima* decision, however, especially in light of express statements that the taxability of fee-patented land is the result of its alienability, the language relied upon by the majority is nothing other than a clarification of the Court's determination that the proviso constituted a "reaffirmation" of Congress' grant of authority to tax found in section 5 of the GAA. Both the *Lummi* decision and the dissent in this case recognized that distinction.

An additional indication of the majority's misunderstanding of this Court's holding in *Yakima*, is its misinterpretation of the reasoning underlying the Court's refusal to permit imposition of the excise tax on *sales* of land, while sustaining imposition of the ad valorem tax on the land itself. As the majority points out, the *Yakima* decision, while holding that the GAA authorized Yakima County to impose an ad valorem tax on tribal land, held that it did not authorize imposition of an excise tax on sales of that land. App. 16. The majority concluded that:

> If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA.



*Id.* That conclusion is incorrect. Rather than basing its excise tax holding on the nature of the Tribe's ownership interest in the property, this Court made it clear in *Yakima* that the difference in the *incidence* of the two taxes was the determinative factor leading to the conclusion that the GAA, while authorizing an ad valorem tax on tribal land, did not authorize an excise tax on sales of that land. *County of Yakima*, 502 U.S. at 269-70. In short, the *Yakima* Court did not draw a distinction between the ad valorem tax and the excise tax based on the nature of the Tribe's ownership interest in the real estate. It drew a distinction between them based on the conclusion that the GAA authorized only a tax whose incidence is on the land itself, not a tax whose incidence is on "transactions involving land."[7] *Id.* For this reason, the *Yakima* Court's holding that the excise tax is unenforceable as outside the purview of the GAA is separate and apart from its holding on the ad valorem tax issue, and in no way implies that this Court would have upheld the excise tax had it based its holding of taxability on the alienability of the land in question.[8]

---

[7] It is apparent that this Court focused on the Burke Act proviso in the course of its discussion of the excise tax issue because Yakima County contended that the proviso authorized imposition of the excise, as well as the ad valorem, tax.

[8] The court in *Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997), made the same interpretational error in discussing the excise tax question. 106 F.3d at 133-34.

Finally, the majority opinion in this case stated that the Court's remand in *Yakima* "left open the question of whether land allotted under a different act might be taxed or not." App. 14 (footnote omitted). To the contrary, the remand was at the instance of the Yakima Nation which contended that it was not clear, as a factual matter, whether the lands in question were patented under the GAA or "some other statutes in force prior to the Indian Reorganization Act." 502 U.S. at 270. This Court stated simply that "[w]e leave for resolution on remand that factual point, and the prior legal question whether it makes any difference." *Id.* For all of the aforesaid reasons, the Eighth Circuit decision in this case is erroneous.



## CONCLUSION

In light of the split among the circuits on the question presented, the likelihood of additional conflicting decisions regarding the taxability of freely alienable tribal land, and the Eighth Circuit's erroneous decision in this case, petitioners respectfully request that the Court grant this petition.

Dated: July, 1997

Respectfully submitted,

Office of Cass County Attorney

EARL E. MAUS
Cass County Attorney
*Counsel of Record*
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
(218) 547-7255

*Counsel for Petitioners*

*Of Counsel:*

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

---

No. 95-4263

---

Leech Lake Band of Chippewa Indians,

Plaintiff/Appellant,

v.

Cass County, Minnesota; Sharon K. Anderson, in her official capacity as Cass County Auditor; Marge L. Daniels, in her official capacity as Cass County Treasurer; Steve Kuha, in his official capacity as Cass County Assessor; James Demgen, in his official capacity as Cass County Commissioner; John Stranne, in his official capacity as Cass County Commissioner; Glen Witham, in his official capacity as Cass County Commissioner; Erwin Ostlund, in his official capacity as Cass County Commissioner; Virgil Foster, in his official capacity as Cass County Commissioner,

Defendants/Appellees.

* Appeal from the United States District Court for the District of Minnesota

---

United States of America,

Amicus Curiae.

White Earth Band of Chippewa Indians,

Amicus Curiae.

Fond Du Lac Band of Chippewa Indians,

Amicus Curiae.

---

Submitted: October 23, 1996

Filed: March 6, 1997

---

Before MAGILL, BRIGHT, and MURPHY, Circuit Judges.

---

MURPHY, Circuit Judge.

This case involves the tax status of land within an Indian reservation which was once alienated from Indian ownership and subsequently reacquired by the tribe in fee simple. In 1993 Cass County, Minnesota levied an ad valorem tax on such fee land owned by the Leech Lake Band of Chippewa Indians. The Band paid the taxes under protest and sought a declaratory judgment that the land is immune from state taxation, an injunction ending the taxation, and an order refunding the taxes already paid. Based on its interpretation of *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), the district court granted summary judgment for Cass County. The Band appeals. We affirm in part and reverse in part.

I.

The Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe, whose reservation is located in northern Minnesota. The reservation was created by a series of treaties with the United States government, beginning in 1855 and ending with an executive order in 1874. *See, e.g., Treaty with the Chippewas*, Feb. 22, 1855, 10 Stat. 1165 (1855); *Leech Lake Band of Chippewa Indians v.*



*Herbst*, 334 F. Supp. 1001, 1002 (D. Minn. 1971). Although the pattern of land ownership within the reservation has varied over the years, the reservation has never been disestablished or diminished. *See Herbst*, 334 F. Supp. at 1002 (D. Minn. 1971) (involving hunting and fishing rights); *State v. Forge*, 262 N.W.2d 341, 343-44 (Minn. 1977) (same).

The Band's original reservation was impacted by changes in federal Indian policy. During the latter part of the nineteenth century, the United States adopted an allotment policy in order to break up reservations previously established by treaty. This policy granted allotments of land to individual tribal members and sold the often sizable remainder of reservation land to non-Indians. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 127-38 (1982). The purpose of the policy was to open land to non-Indians and to assimilate the Indian people into the broader American society. *Id.* at 128. The overall effect was drastically to reduce the amount of land under Indian control. *Id.* at 138.

The legislative centerpiece of the allotment policy was the General Allotment Act (GAA), ch. 119, 24 Stat. 338 (1887), (codified as amended in scattered sections of 25 U.S.C.) (sometimes referred to as the Dawes Act). Under the GAA, parcels of land to be granted to individual Indians were initially held in trust by the United States. Section 5 of the GAA provided that after a twenty-five year trust period, the United States would convey the

land in fee simple to the individual allottee.[1] During the trust period the allottees were not permitted to convey the land. Section 6 of the GAA provided that the allottees would be subject to state civil and criminal law.

In 1906 Congress amended the GAA by the Burke Act, ch. 2348, 34 Stat. 182 (1906). The Burke Act amended § 6 of the GAA to make clear that allottees would be subject to state law only after the expiration of the trust period and issuance of a patent in fee simple.[2] *Yakima*, 502

---

[1] Section 5 of the GAA provides the actual authorization for issuing fee patents to individual Indian allottees. Section 5 of the GAA states, in part:

> [A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. . . .

25 U.S.C. § 348 (1996).

[2] After the Burke Act amendments, § 6 provides in pertinent part:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . . Provided, That [sic] the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all



U.S. at 264. The Burke Act contained a proviso which enabled the Secretary of the Interior to issue a fee simple patent before the expiration of the twenty-five year trust period to "competent and capable" allottees. Burke Act, ch. 2348, 34 Stat. 182 (1906). The proviso stated that land allotted under the GAA would be free from restrictions on "sale, incumbrance, or taxation" when a patent was issued in fee. *Id.; see Yakima*, 502 U.S. 264 n.4.

For the Leech Lake Band and other Minnesota Chippewa tribes, the allotment policy was carried out through the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889), which partially incorporated the GAA. The Nelson Act created a commission to negotiate with the Band for the "cession and relinquishment" of its reservation land. *Id.* The Leech Lake Band agreed in 1889 to have land disbursed under the Nelson Act and the agreement went into effect in 1890.

The details of the negotiations with the Leech Lake Band are unclear, but there is some evidence that representatives of the United States told other Minnesota Chippewa tribes that the land allotted to the individual tribal members would not be taxed. During the negotiations a member of the White Earth Band of Chippewa Indians asked the United States' lead negotiator, Harry M. Rice, this question: "I should like to ask whether,

---

> restrictions as to sale, incumbrance, or taxation of said land shall be removed.

25 U.S.C. § 349 (1996).

when the Dawes bill[3] refers to the civil and criminal laws, those provisions apply so as to make our people here subject to the taxation of the white man?" Mr. Rice responded: "I think you will come within the same rule as officers at the United States forts; their property is not taxed." *The Chippewa Indians in Minnesota*, H.R. Ex. Doc. No. 247, at 93 (1890). Individuals from other tribes were present during this colloquy. *Id.* Cases involving other bands and other legislation have suggested that the land might only be free from taxation during the original trust period, however. *Mahnomen County, Minn. v. United States*, 319 U.S. 474, 480 (1943) (Murphy, J., dissenting) (land allotted to Mahnomen County Band of Chippewa Indians under Clapp Act exempt from taxation for twenty-five years); *United States v. Spaeth*, 24 F. Supp. 465, 469 (D. Minn. 1938) (land allotted to a White Earth Chippewa Indian under Clapp Act exempt from taxation for twenty-five years).

The Nelson Act disposed of reservation land in three ways. The allotment of land to individual Indians under § 3 of the Nelson Act was done in conformity with the GAA, and Leech Lake tribal members were allotted land either within the Leech Lake reservation or within the reservation of the White Earth Band of Chippewa Indians, which is also in northern Minnesota. The rest of the land was made available to the general public. Some was sold under §§ 4 and 5, the pine lands provisions, and the rest was sold under § 6 pursuant to the Homestead Act, ch. 75, 12 Stat. 392 (1862).

---

[3] Section 3 of the Nelson Act incorporated the Dawes Act. Nelson Act, ch. 24, 25 Stat. 642, 643 (1889).



Federal Indian policy changed substantially once again in 1934 with the passage of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1996)). The IRA reestablished federal recognition of Indian tribes, and while it did not repeal allotment statutes such as the Nelson Act, it ended the allotment policy and sought to reverse the erosion of the tribal land base by extending indefinitely the trust period for all land held by the United States in trust for Indian tribes. 25 U.S.C. §§ 461-462. The Band is governed in part by a constitution adopted by the Minnesota Chippewa Tribes pursuant to the IRA. *See* § 476.

The Leech Lake Band managed to preserve its tribal identity despite the federal allotment policy and has maintained a continuing presence on its reservation land. During the allotment period over three quarters of the tribal members who were allotted land remained within the Leech Lake reservation boundaries. 4 Folwell, *History of Minnesota* 235 (1930). Nonetheless, by 1977 the Band and individual tribal members owned only 27,000 acres, or less than five percent of the reservation land. *See Forge*, 262 N.W.2d at 343 & n.1 (Minn. 1977). In an effort to rebuild what was lost through the allotment policy, the Band began slowly to recover its land base.

The land in question in this case consists of twenty-one parcels within the boundaries of the reservation. The legal description of each parcel is found in paragraph ten of the Band's complaint. This land was once held in trust for the Band by the United States according to terms of their treaties, but was later alienated from tribal control under provisions of the Nelson Act. Thirteen of the parcels were allotted to individual Indians under § 3 of the

Act; seven parcels were sold as pine lands under §§ 4 and 5 for commercial timber harvest by non-Indians; and one parcel was distributed under § 6 as a homestead plot to a non-Indian. Subsequently, all parcels came to be held by non-Indians, but the Band reacquired each parcel in fee between 1980 and 1992.

Cass County did not impose its ad valorem tax on these parcels until 1993, one year after the Supreme Court issued its *Yakima* decision. The Court had held in *Yakima* that Indian lands originally allotted under the GAA were subject to certain types of state taxation. 502 U.S. at 270. It found that the language of § 6 of the GAA supported an ad valorem tax on such land, but not an excise tax on its sale. *Id.* at 266-70. The Band initially declined to pay the taxes levied by Cass County, but eventually paid under protest in order to avoid foreclosure. By July 1, 1995 it had paid a total of over $64,000 in taxes.

In June 1995, the Band filed suit in federal court seeking a declaratory judgment that the lands are not taxable by the County. The district court granted summary judgment in favor of Cass County, holding that all land alienated from tribal control under the Nelson Act was taxable. *Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995). The court interpreted *Yakima* to mean that land held by Indian tribes is taxable by the state if it is freely alienable and dismissed the Band's case.[4]

---

[4] Although judgment was entered in favor of the County, the court also provided an "alternative holding" under which the pine land and homestead parcels would be found not taxable since only § 3 of the Nelson Act incorporated the GAA.



II.

On appeal the Band contends that *Yakima* can be distinguished from the present case both factually and legally. The Band asserts that *Yakima* was concerned primarily with fee land owned by individual tribal members rather than the tribe itself. The principle of tribal sovereignty can defeat state taxation here it says.

*Yakima* cannot be so easily distinguished, however. The land involved in that case was held both by individual Indians and the tribe itself. 502 U.S. at 256, 270. Although tribal sovereignty can be an impediment to the exercise of state jurisdiction over Indians and their property, *see, e.g., Montana v. United States*, 450 U.S. 544, 565-66 (1981), considerations of inherent sovereignty may not prevent certain forms of taxation. *Yakima*, 502 U.S. at 257-58 (noting that "platonic notions of Indian sovereignty . . . have, over time, lost their independent sway." (citations omitted) (internal quotations omitted)).

In *Yakima*, the county had imposed an ad valorem tax on all real property and an excise tax on the sale of such property.[5] It believed that these taxes applied to all land within the county, even land patented in fee under the GAA and owned by the Yakima Indian Nation or individual tribal members within the reservation boundaries.

---

908 F. Supp. at 697. The district court indicated that this would be its conclusion if *Yakima* should be read as reaffirming the long-standing principle that Congress must provide unmistakably clear intent to permit state taxation of Indian lands.

[5] In contrast, Cass County has only imposed an ad valorem tax.

When the county threatened to foreclose on certain parcels for which taxes had not been paid, the tribe brought suit for declaratory and injunctive relief. The Supreme Court held that the GAA authorized the ad valorem tax levied by Yakima County, but not the excise tax. 502 U.S. at 270. The ad valorem tax was acceptable because the Burke Act proviso permitted the "taxation of . . . land," and this was sufficient to overcome the Court's per se rule against state taxation of Indians or their land. *Id.* at 267-68. The language of the proviso was not sufficient to indicate Congress had authorized an excise tax on the sale of such land, however. *Id.* at 268-69.

The meaning of *Yakima* as precedent is crucial to the outcome of the case before this court. The Band argues that *Yakima* is consistent with many other cases requiring an "unmistakably clear" congressional intent to allow any form of state taxation. According to the Band, the Court found unmistakably clear congressional intent for the ad valorem tax by examining the text and effect of both § 5 and § 6 of the GAA.[6] Section 5 made the land to be transferred alienable, a necessary precondition to state taxation of Indian lands. It was § 6, however, as amended by the Burke Act proviso, that provided the unmistakably clear intent to allow such taxes. The Band points out that this is the reading of *Yakima* adopted in *Southern Ute*

[6] As discussed above, § 5 of the GAA provides that after a 25 year period during which the United States would hold allotments in trust for individual Indians, fee patents would be issued to the allottees. Section 6 of the GAA provides that the individual Indian allottee with a fee patent would be considered a citizen subject to the laws of the state or territory in which he or she resided.



*Indian Tribe v. Board of County Comm'rs*, 855 F. Supp. 1194 (D. Colo. 1994), *vacated*, 61 F.3d 916 (10th Cir. 1995) (on ripeness grounds). *Southern Ute* read *Yakima* to mean that the alienability established in § 5 "was not an independent justification for taxation," but rather an implication of taxability, while the specific language of § 6, as amended by the Burke Act proviso provided the "unmistakably clear" congressional intent to allow such taxation. *Southern Ute*, 855 F.Supp. at 1200.

Cass County, on the other hand, argues that *Yakima* stands for the proposition that if Indian lands are made alienable in any way, they are taxable by the state. Section 5 of the GAA, making allotments alienable, is seen as the key to the validity of the ad valorem tax in *Yakima*. The County finds support in two cases which have interpreted *Yakima* to mean "alienability equals taxability." *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1993); *Saginaw Chippewa Tribe v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *rev'd*, Nos. 95-1574, 95-1575, 1997 WL 20402 (6th Cir. Jan. 22, 1997). Both *Lummi* and the district court in *Saginaw* seized on the relatively brief discussion of § 5 in *Yakima* as evidence that an act of Congress can subject Indian lands to state taxation by doing nothing more than making them alienable. *Lummi*, 5 F.3d at 1357-58; *Saginaw*, 882 F. Supp. at 672.

Subsequent to oral argument in this case the Sixth Circuit reversed the *Saginaw* district court. *Saginaw Chippewa Indian Tribe v. Michigan*, Nos. 95-1374, 95-1575, 1997 WL 20402 (6th Cir. Jan. 22, 1997). The Sixth Circuit concluded that *Yakima* was consistent with the general rule requiring unmistakable congressional intent to permit

taxation of Indian land and that making land alienable does not in itself show the requisite intent. It stated the Court's holding as follows:

> In *Yakima*, the Supreme Court held that "by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso manifested a clear intention to permit the state to tax such Indian lands."

*Saginaw*, 1997 WL 20402, at *4, *citing Yakima*, 502 U.S. at 259. Despite the Sixth Circuit's thorough discussion of *Yakima* and earlier precedent on which the dissent relies in this case, the dissent mentions this decision only in passing.

The County's theory that alienability always equals taxability is unsatisfactory because it fails to consider the language and context of the entire *Yakima* opinion. First, as the County concedes, its reading conflicts with the *Yakima* opinion itself and with Supreme Court precedent requiring Congress to provide unmistakably clear intent before allowing state taxation of Indians or their property. *See Yakima*, 502 U.S. at 258 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1986)).

Second, in order to support its argument, the County must read *Yakima* as resting its conclusion solely on the effect of the alienability section of the GAA. This reading disregards the significance given by the Court to the language of § 6 of the GAA. It repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear



congressional intent to allow the ad valorem tax levied by Yakima County. 502 U.S. at 258-59.

Third, the County's reading of *Yakima* also disregards the language and analysis in section III of the opinion. In section III, the Court separately analyzed each type of tax at issue and concluded that the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied by Yakima County. 502 U.S. at 268. As the Sixth Circuit noted in *Saginaw*,

> Rather than finding that alienable Indian lands are subject to excise taxes on the general policy grounds advocated by the defendants, the [*Yakima*] Court carefully parsed the language of the General Allotment Act to determine whether or not Congress expressed an unmistakably clear intention to subject the land to such taxes.

*Saginaw*, 1997 WL 20402, at *5. If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA. Instead, the Court refused to uphold the excise tax because it found that the language of the Burke Act proviso could not justify the imposition of such a tax. *Id.* at 268-70. Under the County's reading of *Yakima*, section III of the opinion would be superfluous and the Court would have reached a different result.

Finally, if alienability were equivalent to taxability, it is difficult to explain the terms of the remand in *Yakima*.

That remand left open the question of whether land allotted under a different act might be taxed or not.[7] If alienability equaled taxability it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation.

To determine if a state may tax Indians or their property, the Supreme Court has consistently asked whether Congress has made its intent to allow state taxation unmistakably clear. The Court in *Yakima* stated the rule strongly:

> [S]tate jurisdiction over the relations between reservation Indians and non-Indians may be permitted unless the application of state laws "would interfere with reservation self-government or impair a right granted or reserved by federal law." (citation omitted) In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is

---

[7] The scope of the *Yakima* remand was as follows:

> The Yakima Nation contends it is not clear whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act (citations omitted). We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.

502 U.S. at 270.



> without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114 (1973). And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985); *see also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17, 107 S. Ct. 1083, 1091, n.17, 94 L. Ed. 2d 244 (1987).

502 U.S. at 258. Both sides in the case also framed the proper inquiry as whether the GAA evinced an unmistakably clear congressional intent to permit state taxation. *Id.* at 258-60. *Yakima* inquired whether Congress had made its intent to allow state taxation unmistakably clear and found that Congress had for the ad valorem tax, but not for the excise tax. *Id.*[8]

The Burke Act amendment to § 6 of the GAA was identified after inquiry as the main source of the unmistakably clear congressional intent to allow the state ad valorem tax. For example, in the third paragraph of section II, the Court states:

> Yakima County persuaded the Court of Appeals, and urges upon us, that express authority for

---

[8] The Band argues that even if alienability were always to equal taxability, the lands in this case would not be taxable because they are not alienable under the Non-Intercourse Act, 25 U.S.C. § 177 (1996). Since this case turns on whether an unmistakably clear congressional intent has been expressed to allow state taxation of the parcels, it is not necessary to consider any issue related to the Non-intercourse Act.

> taxation of fee-patented land is found in § 6 of the General Allotment Act, *as amended* [by the Burke Act proviso] (emphasis added) (footnote omitted). We have little doubt about the accuracy of that threshold assessment. . . . And we agree with the Court of Appeals that by specifically mentioning immunity from land taxation "as one of the restrictions that would be removed upon conveyance in fee," *Congress in the Burke Act proviso "manifest[ed] a clear intention to permit the state to tax" such Indian lands.* (emphasis added) (citation omitted).

502 U.S. at 259.

The Burke Act proviso was also seen as the main source of statutory ambiguity where the state excise tax levied by Yakima County was concerned. "While *the Burke Act proviso* does not purport to describe the entire range of in rem jurisdiction States may exercise with respect to fee-patented reservation land, we think it *does describe the entire range of jurisdiction to tax.*" *Id.* at 268 (emphasis added). The Court concluded that the language of the proviso did not clearly permit a state excise tax, noting that "the short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.' " *Id.* at 269. "It is quite reasonable to say, in other words, that though the object of the *sale* here is land, that does not make land the object of the *tax*, and hence does not invoke the Burke Act proviso [which only authorizes the 'taxation of . . . land']." *Id.* at 268-69.

The County counters by pointing to one particular sentence for the strongest evidence that *Yakima* should be



read to mean alienability equals taxability. The dissent also describes this sentence as the specific holding of *Yakima*. The sentence states: "Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. As the Sixth Circuit points out, however:

> When read out of context, this statement seems to support the defendants' claim that any congressional act making Indian land alienable is sufficient to show a clear intention to make the land subject to property tax. Within the context of the *Yakima* opinion, however, *this statement was merely part of an explanation of the structure of the General Allotment Act.*

*Saginaw*, 1997 WL 20402, at *2 (citations omitted) (internal quotation omitted) (emphasis added).

In the very next sentence to the one relied on by the County, the Court noted that "the Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear." *Id.* at 264. The import of this latter sentence is that § 5 only implied taxability. This reading is confirmed four sentences later when the Court states that the Burke Act proviso "reaffirmed for such 'prematurely' patented lands what § 5 of the General Allottment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.*

The *Yakima* Court thus understood § 5 to be only an implication of taxability, and § 6, as amended by the Burke Act proviso, was needed to show the necessary clear intent to tax. No court has taken the position that an implication alone is sufficient to provide unmistakably

clear congressional intent to allow state taxation, and *Yakima* found an unmistakably clear congressional intent to allow state taxation on land by relying on both the language and effect of §§ 5 and 6, as amended, of the GAA. Without alienability there would be no taxability, but it does not follow that alienability alone is sufficient to provide the requisite unmistakable intent. Something like the language of the Burke Act proviso in § 6 is needed to find unmistakably clear intent to allow state taxation. *Id.* at 259.

The history of the Burke Act also demonstrates that § 6, as amended, is the source of the necessary clear intent to allow state taxation of land (but not its sale). The proviso was passed in reaction to the Supreme Court's decision in *In re Heff*, 197 U.S. 488 (1905), which held that § 6 of the GAA subjected an Indian allottee to the personal jurisdiction of the state the moment the allotment in trust was made. *Yakima*, 502 U.S. at 264. Since the land was still being held in trust by the United States, it was presumably not taxable by a state even though personal jurisdiction existed over the titular owner of the land.[9]

---

[9] In the debates preceding the enactment of the Burke Act, Rep. Curtis stated:

> The main advantage of [the Burke Act] is that under [its decision in *In re Heff*] the Supreme Court has held that after a patent has issued [in trust], notwithstanding the Indian does not secure a title in fee for twenty-five years, he becomes a citizen of the United States, and that State courts have full jurisdiction over him, but not over his property. . . . Now, this bill, if enacted, will leave him under the



*Heff*, 197 U.S. at 509 (distinguishing personal jurisdiction from jurisdiction over the land). *In re Heff* thus created a situation where the state could have jurisdiction over the Indian allottee, but not over his or her land.

The purpose of the Burke Act legislation was, at least in part, to clarify the post-*Heff* reach of state jurisdiction over Indians receiving allotments. *Yakima*, 502 U.S. at 264. The Burke Act amendment accomplished two things. First, it changed the point at which state law would apply to an allottee Indian from the time when a trust patent was first issued to the time when a patent was issued in fee. *Id.* Second, it made clear that an allottee could be subject to taxation upon issuance of a fee patent. *Id.* at 259. The Burke Act proviso to § 6 of the GAA is thus the primary source of the requisite clear congressional intent to allow state ad valorem taxes on Indian lands.

The *Yakima* Court discussed § 5 and alienability in a single paragraph of section II of its opinion. That paragraph addressed the relevance of *Goudy v. Meath*, 203 U.S. 146 (1906), to the arguments of the Yakima Nation and the United States as amicus.[10] *Goudy* had held that an Indian

---

> control of the [federal] Government until he secures a patent conveying the fee. . . .

40 Cong. Rec. 3599 (1906).

[10] The Court discussed alienability and *Goudy* to distinguish *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462 (1976), from the case of Yakima Nation. *Moe* had held that § 6 of the GAA did not give a state general personal jurisdiction over Indians within a reservation. 425 U.S. at 478. In *Yakima* the tribe and the United States argued that *Moe* meant a state could not impose an ad valorem tax on Indian land, 502 U.S. at 262, but the Court felt that this interpretation of *Moe*

allottee could be personally liable for delinquent real estate taxes on fee land allotted under the GAA. The *Goudy* Court found liability for two reasons. First, the Court noted that it would be strange for Congress to remove restrictions on alienation of the land and not subject it to taxation. *Id.* at 149. Second, the Court found that the language of § 6 extended the laws of the state or territory to the Indian allottee, including the state tax laws. *Id.* at 149-50.

*Yakima* characterized the *Goudy* decision as one in which alienation was of central significance to the finding of liability. 502 U.S. at 263. The Court never suggested that *Goudy* relied exclusively on the alienability of the land. Instead, the *Goudy* decision premised liability on both the alienability of the land and the specific language of § 6 of the GAA. *Goudy*, 203 U.S. at 149-50. *Goudy* is therefore analogous to *Yakima* where the Court relied on both the express language of § 6, as amended by the

---

amounted to an implied repeal of § 6 and it was not willing to read *Moe* that broadly. *Id.* Instead the Court concluded that, as in *Goudy*, a contributing factor to the taxability of the land was that it had been made alienable under § 5. The *Yakima* Court raised *Goudy* and alienability, not to depart from its precedent requiring an unmistakably clear congressional intent to allow state taxation, but in order to distinguish *Moe* and to demonstrate that § 6 remained a viable source of unmistakable intent for in rem taxing jurisdiction.



Burke Act proviso,[11] and the § 5 alienability of the land, which created the necessary conditions for taxation.

In sum, the County's reading of *Yakima* conflicts with other language in the opinion itself, and with strong Supreme Court precedent espousing an unmistakably clear congressional intent rule. While the Court considered alienability as one factor contributing to the taxability of the land, alienability alone was not sufficient to allow state taxation. The express language of the Burke Act proviso in § 6 of the GAA was needed to make sufficiently clear the intent of Congress to allow state ad valorem taxes.

III.

The parcels of land involved in this case were alienated from tribal control by the Nelson Act and subsequently reacquired by the Band in fee. State taxation of Indian land is not authorized unless Congress "has made its intention to do so unmistakably clear." *Yakima*, at 258, *quoting Montana v. Blackfeet Tribe*, 471 U.S. at 765. The question in this case is whether the Nelson Act evinces an "unmistakably clear" congressional intent to allow an ad valorem tax on these parcels.

---

[11] The district court suggested that the Burke Act amendment reaffirmed the Supreme Court decision in *Goudy*. That amendment actually predated the *Goudy* decision, however. The Burke Act was passed on May 8, 1906, and *Goudy* was decided on November 19, 1906. Although the *Goudy* opinion does not specifically mention the language of the Burke Act proviso, that language was presumably available for the consideration of the Court.

Eight of the 21 lots were sold as pine lands or distributed as homestead lands under § 4, § 5, or § 6 of the Nelson Act. These sections of the Act, unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee. These parcels are therefore not subject to state taxation.

Section 3 of the Nelson Act allotted certain lands on the Leech Lake reservation by incorporating the mechanisms of the GAA. The Band argues that the GAA itself does not evince an unmistakably clear intent to allow ad valorem taxes on tribally held land because §§ 5 and 6 of the GAA only address the allotment of land to individual Indians, but that argument cannot be reconciled with the holding of the Supreme Court in *Yakima*. *Yakima* held[12] that after the addition of the Burke Act proviso, lands allotted under the GAA are subject to state ad valorem taxes when they are patented in fee. 502 U.S. at 266-70. This is true for both lands allotted to individual Indians

---

[12] The Court specifically stated:

> We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act, but does not allow the county to enforce its excise tax on the sale of such land.

502 U.S. at 270. This explicit statement of the holding follows the Court's discussion in section III describing how the language of the Burke Act proviso provides the unmistakably clear congressional intent to allow the state ad valorem tax, but not the excise tax. The dissent locates what it views as the holding elsewhere in a paragraph discussing the Court's previous decision in *Goudy*. We follow the explicit holding as stated by the Supreme Court.



and lands subsequently reacquired by a tribe. *See id.* at 256, 270. For these reasons the land which passed under § 3 of the Nelson Act is taxable if it was patented after the passage of the Burke Act proviso in 1906, but not if it were patented before then.[13]

In sum, the judgment in favor of the County is vacated. The district court is affirmed in its determination that the County may apply its ad valorem tax to land allotted under § 3 of the Nelson Act, unless any parcel is shown to have been patented in fee before the passage of the Burke Act. The judgment is reversed as to the parcels which passed under the pine lands or homestead sections of the Act and the case is remanded for consideration of

---

[13] In theory, every parcel in dispute here should have been patented in fee after 1906. The Nelson Act was passed in 1890. Given a twenty-five year trust period, the earliest a fee patent should have issued was 1915. The administration of the allotment policy was not always smooth or consistent, however. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 132-34 (1982) (describing "piecemeal process" of amending and developing the allotment program after the passage of the GAA). The record does not reveal when these parcels were patented in fee, and it is possible, if not likely, that some were patented before 1906. *See, e.g., United States v. Thurston County, Neb.*, 143 F. 287, 288 (8th Cir. 1906) (noting 1902 amendment to the GAA allowed Indian devisee to sell or convey inherited allotment before expiration of trust period); *Nat'l Bank of Commerce v. Anderson*, 147 F. 87, 90 (9th Cir. 1906) (same); *see also* LeAnn Larson LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners be Liable for Government's Wrongdoing?*, 30 S. D. Law Rev. 59, 65 & n.42 (1984) (noting congressional practice of issuing premature fees through special legislation before 1906); Delos Sacket Otis, *The Dawes Act and the Allotment of Indian Lands* 150-51 (F. Prucha ed., University of Oklahoma Press 1973) (same).

that portion of the Band's claim for refunds which is still relevant and for any necessary proceedings consistent with this opinion.

MAGILL, Circuit Judge, concurring in part and dissenting in part.

I concur in section III of the majority opinion to the extent that it affirms the district court's conclusion that the allotted lands in this case were properly taxed by Cass County. I respectfully dissent from the remainder of the majority's decision.

In 1993 Cass County, Minnesota, (County) began imposing ad valorem taxation on lands held in fee simple by the Leech Lake Band of Chippewa (Band), a federally recognized Indian tribe, on the Leech Lake Reservation.[14] The Band brought this action in the district court seeking

---

[14] This case involves twenty-one parcels of land which were originally held in common by the Band under aboriginal title and which were subsequently held in trust by the United States. In 1889 Congress enacted the Nelson Act, ch. 24, 25 Stat. 642, which allotted land held in common by the Band to individual Indians. Thirteen of the parcels in this case were so allotted and eventually became alienable. The Nelson Act also disposed of surplus lands, including lumbering lands (pine lands) and homesteads, to non-Indians. Seven of the parcels were originally sold as pine lands, and the remaining parcel was originally sold as a homestead. The twenty-one parcels were reacquired by the Band after 1980. Some of the land is undeveloped, while there are tribal facilities on other parcels. Although the Band successfully converted other reacquired lands – including a casino – to trust status, *see* Summ. J. Tr. at 9; *see also* 25 U.S.C. § 465 (statutory procedure for placing lands in trust with the United States), the title to the twenty-one parcels at issue in this case are held by the Band in fee simple.



injunctive relief from future taxation by the County and a judgment for the $64,000 in taxes which it has paid, under protest, to the County. Relying on *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), the district court held that the taxation had been proper, and granted summary judgment to the County. I would affirm.

In *Goudy v. Meath*, 203 U.S. 146 (1906), the United States Supreme Court held that alienable lands held by a member of the Puyallup Tribe were subject to state taxation. The Court reasoned:

> That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw the protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he please, while at the same time releasing it from taxation. . . . Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens – that is, that no exemption exists by implication but must be clearly manifested.

*Id.* at 149. Relying on this reasoning, the United States Supreme Court in *Yakima County* held that lands originally allotted to Yakima Indians pursuant to the General

Allotment Act of 1887, also known as the Dawes Act, ch. 119, 24 Stat. 388, codified in part as amended at 25 U.S.C. § 331, and which were subsequently held by individual Indians and the tribe in fee simple were subject to county ad valorem taxation. The *Yakima County* Court specifically held that

> when § 5 [of the General Allotment Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

507 U.S. at 263-64.

In *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994), the Ninth Circuit accepted this clear pronouncement by the Supreme Court that alienability of land allowed taxation of the land, and held that:

> The logic propounded by the *Goudy* Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burden as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

*Id.* at 1358 (allowing county taxation of alienable land held by tribe). *But see United States on Behalf of Saginaw Chippewa Tribe v. Michigan*, 1997 FED App. 0026P (6th Cir. Jan. 22, 1997) (rejecting *Lummi* court's interpretation of



*Yakima County* and holding that alienability does not necessarily allow taxation).

Rather than accept the clear rule propounded by the *Yakima County* Court that alienability allows taxation, the majority declares that the homestead lands and pine lands in this case are exempt from taxation, and engages in a strained analysis of the *Yakima County* decision that eviscerates its holding. For example, because the *Yakima County* Court supported its conclusion that the land in question was taxable by noting that "[t]he Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear," 507 U.S. at 264, the majority concludes that the Burke Act analysis was necessary to the *Yakima County* Court's conclusion.[15] *See* Maj. Op. at 12-13. The majority insists that § 5's grant of alienability did not allow taxation, asserting that "[n]o court has taken the position that an implication alone is sufficient to provide unmistakably clear congressional

---

[15] It is clear that the *Yakima County* Court's analysis of the Burke Act was nothing more than additional support for its holding that alienability resulted in taxability. As the Court stated:

> [T]he [Burke Act] proviso *reaffirmed* for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.

*Yakima County*, 507 U.S. at 264 (emphasis added). I note that, as a matter of plain logic, a "reaffirmation" supports, rather than controls, a conclusion. In addition, rather than being limited by the Burke Act's provision for the taxation of only prematurely patented land, the *Yakima County* Court allowed taxation over all land allotted under the General Allotment Act. *See id.* at 270.

intent to allow state taxation. . . . " *Id.* at 13. This statement simply disregards the *Yakima County* Court's treatment of § 5, and is strongly reminiscent of the *Yakima County* dissent:

> The majority concedes that § 5 only "implied" this conclusion. In my view, a "mere implication" falls far short of the "unmistakably clear" intent standard.

507 U.S. at 273 (Blackmun, J., dissenting) (citations omitted).[16]

While I can understand the majority's disinclination to accept *Yakima County's* holding, it is nevertheless binding precedent, and should have been followed in this case. Under the clear language of *Yakima County*, alienability of land allows taxation of land. Because all of the lands in this case are fully alienable by the Band,[17] the

---

[16] In reaching its decision to disregard *Yakima County*'s clear holding, the majority also relies on the *Yakima County* Court's remand for a factual determination of "whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act," and the legal determination of "whether it makes any difference." 502 U.S. at 270. I suggest that this remand was either an effort to avoid creating needless dicta, or a reference to the unusual situation noted in *Goudy*, where Congress could explicitly exempt land from taxation, despite making it alienable. *See Goudy*, 203 U.S. at 149. In any event, I do not believe that the remand, particularly considering the phrasing of "whether it makes any difference," can override the clear statement that a statute making land alienable also makes it taxable.

[17] Before both the district court and this appellate panel, the Band argued that the Non-intercourse Act, 25 U.S.C. § 177,



district court properly followed the Supreme Court's clear holding in *Yakima County* and held that the lands are subject to taxation by the County.

I agree with the majority's conclusion in section III of its opinion that the lands originally allotted to Indians are taxable by the County. I disagree, however, with its conclusion that the pine lands and homestead parcel are not. Accordingly, I would affirm the district court's judgment in its entirety.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

limited the alienability of all lands held by an Indian tribe, including recently acquired lands held in fee simple. The district court rejected this argument, *see* Order at 14, as have most courts which have considered it. *See, e.g., Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1359 (9th Cir. 1993) ("No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Non-intercourse Act no longer apply. Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable." (citations omitted)), *cert. denied*, 114 S. Ct. 2727 (1994). The majority has declined to consider this issue. *See* Maj. Op. at 12 n.8.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Plaintiffs,

v.

CASS COUNTY, MINNESOTA and, in their official capacities, SHARON K. ANDERSON, CASS COUNTY AUDITOR; MARGE L. DANIELS, CASS COUNTY TREASURER; STEVE KUHA, CASS COUNTY ASSESSOR; and JOHN STRANNE, JAMES DEMGEN, GLENN WITHAM, ERWIN OSTLUND and VIRGIL FOSTER, CASS COUNTY COMMISSIONERS,

Defendants.

5-95 CIV 99

**ORDER**

(Filed Dec. 6, 1995)

---

Jacobson, Buffalo, Schoessler & Magnuson, Ltd., by JAMES M. SCHOESSLER, Minneapolis, Minnesota, appeared on behalf of Leech Lake Band of Chippewa Indians.

Earl E. Maus, Cass County Attorney, by EARL E. MAUS, Walker, Minnesota, appeared on behalf of Cass County.

Cannon, Kunz & Fischer, by PETER W. CANNON, Mahnomen, MN, for amicus curiae White Earth Band of Chippewa Indians.



Department of Justice, by JUDITH RABINOWITZ, Washington, D.C., for amicus curiae United States of America.

---

This matter comes before the Court on Plaintiff Leech Lake Band of Chippewa Indians' motion for summary judgment. The Leech Lake Band of Chippewa Indians (hereinafter the "Band") argues that the ad valorem tax recently imposed by Cass County on land owned by the Band violates principles of Native American sovereignty and is impermissible under existing case law. Cass County argues that, pursuant to recent United States Supreme Court precedent, taxation of these lands is proper. The Court has determined, and all parties have agreed, there are no factual disputes, the issue presented is solely one of law, and the case is ripe for summary disposition. Pursuant to *Burlington Northern R.R. v. Omaha Public Power District*, 888 F.2d 1228 (8th Cir. 1989), the Court now decides this issue on summary judgment.[1]

---

[1] In *Burlington Northern*, the 8th Circuit rejected the argument that a grant of summary judgment for the non-moving party was improper. "It is within the court's power to grant summary judgment sua sponte against the moving party, lacking a cross motion, where the party against whom the judgment is entered has had a full and fair opportunity to contest that there are no genuine issues of material fact to be tried and the party granted judgment is entitled to it as a matter of law. *Burlington Northern R.R. v. Omaha Public Power District*, 888 F.2d at 1231, n. 3. Because both parties agree there are no disputed facts, this is purely an issue of law, and the case is ripe for summary judgment, the Court is convinced both parties have had a full and fair opportunity to contest the appropriateness of summary judgment. Although defendants

## I. BACKGROUND

### A. Factual History

The Leech Lake Band of Chippewa Indians is a federally recognized Indian Tribe. The land currently recognized as the Leech Lake Reservation (hereinafter the "Reservation") was initially established by the Treaty of February 22, 1855, 10 Stat. 1165. Three reservations were created by the Treaty of 1855 but were subsequently augmented and connected by treaties with the Mississippi Bands of Chippewa dated May 7, 1864, 13 Stat. 693, and March 19, 1867, 16 Stat. 719. Executive Orders in 1873 and 1874 further enlarged the land constituting the Reservation which continues to exist within the same boundaries notwithstanding the patenting of land to individuals.[2]

In 1889 Congress passed the Nelson Act, pursuant to which the United States conveyed millions of acres of land in Leech Lake and other Chippewa reservations in Minnesota to individual Indians and non-Indians. Act of January 14, 1889, ch. 24, 25 Stat. 642. The Nelson Act took effect in 1890 after agreement was reached with Minnesota's Chippewa Indian population and approved by the President. *See* Folwell, *supra* note 1, at 219-235. Three

---

have not moved for summary judgment, all parties agreed at oral argument that summary disposition is appropriate.

[2] Folwell, A History of Minnesota 196 (revised ed. 1956); Royce, Indian Land Cessions in the United States 866, 874 (1899). Most of the history and facts underlying this matter are derived from the Band's well-articulated factual summary submitted in its Memorandum in Support of Summary Judgment.



different methods of conveyance in the Nelson Act are relevant to this lawsuit: §3 allotments, pine land sales, and homestead sales. Under §3, the Nelson Act provided that allotments to individual Indians were to be made "in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. . . . ' " This reference is to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §331 *et seq.*) (hereinafter "GAA"). Conveyance procedures for both pine lands and homestead lands are enumerated in the Nelson Act but do not incorporate or make reference to the GAA. Thirteen of the land parcels at issue were initially allotted to individual Indians under §3, seven were originally sold pursuant to the pine land sales provisions (§§4 and 5 Nelson Act), and one was sold pursuant to the homestead provision (§6 Nelson Act). The land at issue has been bought and sold since the original issuance of fee patents under the Nelson Act and was re-acquired by the Band between 1980 and the present.

Prior to 1993, the land at issue had not been taxed. However, beginning with the 1993 tax year, Cass County began assessing taxes on all of the properties involved. The Band protested the taxes and, after refusing to pay, the Band began to receive delinquent tax notices. The Band eventually paid the taxes on all of the properties and, as of July 1, 1995, had paid Cass County more than $64,000 in taxes, interest, and penalties. The Band seeks: a

declaration that the land at issue is not subject to property taxes imposed by Cass County; a refund of all monies paid for taxes, interest and penalties on the properties; an injunction against Cass County and its administrators prohibiting future taxation of this and similarly situated property and ordering the removal of the properties from the Cass County list of properties subject to taxation.

### B. Legal History

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall's premise was that the "several Indian nations [constitute] distinct political communities, having territorial boundaries, within which their authority is exclusive. . . . " *Id.* at 556-57. Justice Marshall and the *Worcester* Court determined it was the national government, and not the states, that would negotiate and interact with the Indian tribes and bands. *Id.* at 557. Although the "platonic notions of Indian sovereignty" no longer stand on their own, in the taxation context, " 'absent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservations [sic] Indians." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Further, as the *Yakima* Court recognized, United States Supreme Court precedent indicates a "consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably



clear.' " *County of Yakima*, 502 U.S. at 258 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)).[3] These principles of Indian sovereignty are the backdrop for the United States Supreme Court decision in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Because the Court finds the *Yakima* decision controlling, the Court's decision hinges on the interpretation and application of *Yakima*.

## II. DISCUSSION

### A. The Yakima Decision

In 1992, the United States Supreme Court addressed the question of whether the GAA, as amended by the Burke Act of 1906, authorized states to tax land originally allotted to individual Indians and currently owned by either individual Indians or the Indian Tribe or Band. The Supreme Court held that such land is subject to taxation by the State of Washington because Congress deemed it fully alienable.

The Yakima Indian Reservation was established by Treaty in 1855. *See* Treaty between the United States and Yakima Nation of Indians. 12 Stat. 951. Some of the Reservation land was owned in fee as a result of allotments made pursuant to the GAA. Under the GAA, land was to be allotted to individual Indians but held in trust by the United States government for 25 years. Accordingly, the

---

[3] A more complete legal history of state taxation of Indian reservations is contained in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-59 (1992).

land held in trust was not alienable nor encumberable and, upon expiration of the 25 year trust period, the land would be conveyed to the individual Indian in fee. *Yakima*, 502 U.S. at 254; GAA §5. The original §6 of the GAA provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 390.

In reaction to *In re Heff*, 197 U.S. 488 (1905), in which the Supreme Court held that §6 subjected Indian allottees to plenary state jurisdiction, Congress passed the Burke Act of 1906, 34 Stat. 182 (1983) (codified at 25 U.S.C. §349) (hereinafter the "Burke Act Proviso"). The Burke Act Proviso amended §6 of the GAA to provide that state criminal and civil jurisdiction would lie "[a]t the expiration of the trust period . . . when the lands have been conveyed to the Indians by patent in fee." It further gave the President the authority to prematurely terminate the trust period by prematurely patenting the land. Upon premature patenting and conveyance in fee to individual Indians, the Burke Act Proviso provided that "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 34 Stat. 183.

In holding the Yakima Nation land subject to state taxation, the Supreme Court discussed §§5 and 6 of the GAA and its prior decision in *Goudy v. Meath*, 203 U.S. 146 (1906). However, it appears the Court relied on §5 and the *Goudy* decision. In *Goudy*, the Supreme Court held that an Indian who was himself an allottee of land under the Treaty of December 26, 1854, 10 Stat. at L. 1132, was personally liable for property taxes assessed by the



State of Washington. *Goudy*, 203 U.S. at 150. According to the *Yakima* court, it was alienability of the Indian land in *Goudy* which rendered it subject to taxation. *Yakima*, 502 U.S. at 263. In *Yakima*, the court held that alienability was a consequence of §5 of the GAA and, as a result, "when §5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. Despite the Supreme Court's general rule that state taxation of Indian land requires that Congress make its intent to authorize state taxation unmistakably clear, the strong language of the *Yakima* decision leads the Court to the inescapable conclusion that, if Congress has made Indian land freely alienable, states may tax the land (hereinafter referred to as the "alienability equals taxability" rule).

The Court recognizes that the *Yakima* decision is complex and is open to conflicting interpretations. Despite relying on the *Goudy* decision and espousal of the alienability equals taxability rule, the *Yakima* court discussed §5 and the implications of the amendment to §6 via the Burke Act Proviso. The Burke Act Proviso provides, inter alia, that prematurely patented land would be free of "all restrictions as to sale, incumbrance or taxation." 25 U.S.C. §349. The *Yakima* court stated that "the proviso reaffirmed fur such 'prematurely' patented land what §5 of the GAA implied with respect to patented land generally: subjection to state real estate taxes." *Yakima*, 502 U.S. at 264. It is difficult to reconcile the *Yakima* court's statement that Congress must clearly manifest its intent to allow taxation with the statement that §5 merely "implied" subjection to real estate taxes. The only conclusion this Court can draw is that alienation is the touchstone. It appears

that for the *Yakima* Court, §6, as amended, merely reaffirmed its holding that Congress's designation of the GAA land as alienable deemed it taxable. *Id.* at 263-64.

### B. Other Decisions

Three other courts have addressed the issue of whether *Yakima* stands for the proposition that alienability equals taxability. *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1994); *United States ex rel. Saginaw Chippewa Tribe v. Michigan*, 882 F.Supp. 659 (E.D.Mich. 1995); *Southern Ute Indian Tribe v. Board of County Commissioners of the County of La Plata, State of Colorado*, 855 F.Supp. 1194 (D.Colo. 1994), *vacated*, 61 F.3d 916 (10th Cir. 1995). Both the *Lummi* and *United States v. Michigan* courts held that, under *Yakima*, alienability equals taxability. In *Southern Ute*, however, the court rejected the notion that, under *Yakima*, alienability equals taxability. The *Southern Ute* decision was not, however, completely at odds with the present Court's decision.[4]

In *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1994), the Ninth Circuit held that, pursuant to the *Yakima* decision, alienability equals taxability and accordingly land conveyed by treaty to the Lummi Indian Tribe is

[4] The *Southern Ute* decision was vacated by the 10th Circuit on ripeness grounds.



taxable because it is freely alienable.[5] *Id.* at 1358. The *Lummi* court also struggled with the apparent discord between the rule that state taxation of Indian land requires unmistakably clear expression of Congressional intent and the holding in *Yakima* that, if land is alienable, it is taxable. Due to the strength of the language in the *Yakima* decision, however, the court held that because the *Lummi* land is alienable, it is taxable. *Id.* at 1358.

In *United States ex rel. Saginaw Chippewa Tribe v. Michigan*, 882 F.Supp. 659 (E.D.Mich. 1995), the court held that land owned by the Saginaw Chippewa Tribe, patented pursuant to treaty and held in unrestricted fee simple was taxable by the State of Michigan. The *United States v. Michigan* court agreed with the *Lummi* court's interpretation of *Yakima*. "If land is subject to alienation, then it is subject to taxes." *United States v. Michigan*, 882 F.Supp. at 677.

One court has disagreed with the view that, under *Yakima*, alienability equals taxability. *Southern Ute Indian Tribe v. Board of County Commissioners of LaPlata, State of Colorado*, 855 F.Supp. 1194 (1994), *vacated*, 61 F.3d 916 (10th Cir. 1995). In *Southern Ute*, the land at issue was held by the tribe in fee and was originally patented under the Act of June 15, 1880, ch. 223, 21 Stat. 199 ("Act of 1880"), as supplemented by the Act of February 20, 1895, ch. 113, 28 Stat. 677 ("Act of 1895"). *Id.* at 1200-01. Under the Act of 1880, Congress provided that patents in fee simple would be issued to Indians once "the necessary

[5] The lands at issue in both the *Lummi* and *United States v. Michigan* cases were not patented or allotted pursuant to the GAA.

laws are passed by Congress." *Id.* at 1200. The Act of 1880 further provided that:

> The title to be acquired by the Indians shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction. . . . *Id.* at 1200-01.

Thus, pursuant to the Act of 1880, there are three prerequisites to the taxation of allotted land: (1) Congress must enact "the necessary laws" to accomplish the allotment; (2) the twenty-five year trust period must expire; and (3) the President must act to remove the restriction on alienation and taxation. *Southern Ute*, 855 F.Supp. at 1201. By the Act of 1895, Congress initiated the patenting process. The other two pre-requisites had not been met before Congress passed the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479 (1934). Under the IRA, "existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 25 U.S.C. §462.

Accordingly, the land at issue was still subject to the trust restrictions. *Id.* at 1201-02.

According to the *Southern Ute* court, the fact that land is alienable does not necessarily lead to the conclusion that it is taxable. Instead, *Yakima* stood for the proposition that alienability is merely indicia of Congress's intent and



§ 5 of the GAA, by providing for alienability, sufficiently indicated Congress's intent to allow taxation. *Southern Ute*, 855 F.Supp. at 1200. This result is unpersuasive in the situation at hand for two reasons. First, the Southern Ute court's interpretation of *Yakima* minimizes the statement that "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Yakima*, 502 U.S. at 263-64. *Southern Ute* held that alienability is merely indicia of Congress's intent to authorize state taxation of Indian land. This language indicates that alienability is not merely indicia of Congress's intent to authorize taxation but is, in fact, the touchstone for taxability. Second, *Southern Ute* is distinguishable from the situation at hand in that the statute involved in *Southern Ute*, the Act of 1880, specifically deemed the land inalienable. *Southern Ute*, 855 F.Supp. at 1202. The case at hand involves land patented pursuant to the Nelson Act, which incorporated the GAA. The GAA clearly made § 3 land alienable.

### C. The Case at Hand

The only remaining issue is whether or not the land in this case is alienable. Defendant Cass County argues the land is freely alienable. Plaintiff Band argues the land is not freely alienable under the Indian Nonintercourse

Act. 25 U.S.C. § 177 (1983).[6] The Indian Nonintercourse Act ("Nonintercourse Act") provides that: "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. Because the land is not alienable, plaintiff argues, it is not taxable.

Both at *Lummi* and the *United States v. Michigan* courts rejected the same argument *Lummi*, 5 F.3d at 1358-59; *United States v. Michigan*, 882 F.Supp. at 674. As the *Lummi* court pointed out, no court has held that land made alienable by Congress becomes inalienable when reacquired by Indians. *Lummi*, 5 F.3d at 1359. In fact, the Supreme Court has impliedly held the protections of the Nonintercourse Act no longer apply once Congress removes restraints on alienation. *See Larkin v. Paugh*, 276 U.S. 431, 433-34, 439 (1928). In *Larkin v. Paugh*, the Supreme Court held that once the trust period expires and the patent is issued on the GAA land, the incidental restriction against alienation is terminated. "This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction – so that thereafter all questions pertaining to the title were subject to examination and determination by the courts. . . . " *Id.* at 439.

---

[6] The Band also argues that, because the land is not alienable and Congressional approval is required in order to accomplish a transfer, Cass County may not foreclose on the land. Further, because foreclosure is not allowed, neither is taxation. This argument fails for the same reason – the land is freely alienable.



Plaintiff Band cites numerous cases in support of the argument that the Nonintercourse Act makes all Indian land inalienable. *See United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Candelaria*, 271 U.S. 432 (1926). Although it is clear from these and other cases cited by the Band that the Nonintercourse Act initially applies to all tribal lands, it is not clear whether land sold pursuant to Congressional authorization making the land freely alienable becomes inalienable if later reacquired by a tribe or individual Indian. In *United States v. Sandoval*, the court merely held that Congress has the power to legislate concerning fee lands held by Indians. 231 U.S. at 48. In *United States v. Candelaria*, the court held that the Nonintercourse Act applies to Pueblo Indian lands when they are initially acquired and therefore operates as a restriction on alienation for the Pueblo lands at issue. 271 U.S. at 442.

Plaintiff also cites *Alonzo v. United States*, 249 F.2d 189 (1957), *cert. denied*, 355 U.S. 940 (1958), for the proposition that tribal fee lands are protected by the Nonintercourse Act regardless of how they were acquired. *Id.* at 196. The court finds the *Alonzo* case unpersuasive in the situation at hand for numerous reasons. First, the *Alonzo* court's rationale for holding that the Nonintercourse Act restricts alienation regardless of how the land was acquired is outdated and unacceptable to the court. "[T]he reason for the imposition of the restrictions is in nowise [sic] related to the manner in which the Indians acquired their lands. The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races'. . . . " *Id.* at 196.

Second, the *Alonzo* case relied heavily on other statutory provisions in holding the land inalienable. The court stated: "But if we be wrong in our conclusion, which we do not concede, that the Enabling Act did not by implication remove restrictions with respect to lands acquired by the Pueblos by purchase, such restrictions were clearly reimposed by § 17 of the Act of 1924. . . . " *Id.* at 196. The court held the Nonintercourse Act initially imposed restrictions on alienation which were not removed by the Enabling Act. Section 17 of the Act of 1924, however, in clear and unquestionable language, restricted the alienation of the land at issue in *Alonzo:*

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico . . . and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior. *Id.* at 195.

Of utmost importance is that the land at issue in *Alonzo* was never made freely alienable by Congress. The New Mexico, Arizona Enabling Act, 36 Stat. 557-59, the only statute which arguably affects the alienability of the land in *Alonzo*, reads:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and



> remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . .

The *Alonzo* court held this provision did not eradicate the effects of the Nonintercourse Act and thus the land remained inalienable. *Id.* at 196. This result is not surprising as nothing in the Enabling Act even remotely appears to make the land alienable. In the case at hand, however, the land at issue was patented pursuant to the GAA and Nelson Act which clearly establish the free alienability of the land. There is also no provision such as § 17 of the Act of 1924 which reestablishes the inalienability of the land. Accordingly, the result in *Alonzo* is unpersuasive.

The inapplicability of the Nonintercourse Act in the situation at hand is further evidenced by the elements required for a cause of action under the Nonintercourse Act. Element three requires that "the United States has never approved or consented to the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *rev'd on other grounds*, 476 U.S. 498 (1986); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2nd Cir. 1994).[7] The logical conclusion is that once Congress has approved the alienation of a certain

---

[7] The four elements are: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned. *Catawba Indian Tribe*, 718 F.2d at 1295.

piece of land, the protections of the Nonintercourse Act no longer apply.

The land here at issue was originally patented pursuant to the GAA. Congress provided that, upon the expiration of the 25 year trust period or upon premature termination of the trust period, the land would be conveyed to the individual Indian in fee, free of encumbrances and completely alienable. The land was sold by the Indians at some point in time after 1905 and reacquired between 1980 and the present. There were no restrictions on the initial sale of this land. Once Congress deemed the land alienable under the GAA and Nelson Act, it remained so, even when re-acquired by the Band. Because the land remains freely alienable, it is taxable.

**D. Alternative Grounds**

Even if the Supreme Court's decision in *Yakima* does not stand for the proposition that alienability equals taxability and instead merely reiterates the rule that Congress must clearly express its intent to authorize taxation of tribal fee lands, the majority of the land in the instant case would be taxable. Regardless of the rule of law resulting from *Yakima*, on the facts *Yakima* held that land patented pursuant to the GAA, as amended by the Burke Act Proviso, and held in fee by either individual Indians or the Indian Tribe or Band is taxable.

The land at issue was patented and allotted pursuant to the Nelson Act. The procedure utilized for patenting and allotting the majority of the land – § 3 land – incorporated the GAA. Section 3 of the Nelson Act provided that allotments to individual Indians were to be made "in



conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. . . . ' " (GAA). Because § 3 of the Nelson Act incorporates the GAA, all of the land patented pursuant to § 3 would taxable under this alternative reading of *Yakima*.

The Band argues that because the Nelson Act was enacted in 1889, and the amendment to § 6 of the GAA, the Burke Act Proviso, was enacted in 1906, Congress did not intend that the Nelson Act incorporate the Burke Act Proviso. Further, the Band argues, because the *Yakima* court relied on § 6, the Burke Act Proviso, in holding that Congress had clearly expressed its intent, the case at hand is completely distinguishable from *Yakima*.

Although the Burke Act Proviso makes no reference to the Nelson Act in amending the GAA, the Court is of the opinion that, when incorporating the GAA, the Nelson Act intended to incorporate the GAA patenting procedures and not merely the wording contained in the GAA as it read in 1887. The Burke Act Proviso merely clarified the operation of § 5 and added a premature patenting procedure to § 6. It is reasonable to conclude that Congress intended the Burke Act Proviso to apply to all land patenting procedures which incorporate the GAA.

In addition, it is not clear from the *Yakima* decision whether the Supreme Court felt § 6, as amended by the Burke Act, was significant in determining Congress's

intent. In fact, just the opposite appears to be true. Footnote 4 states:

> Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period. . . . *Yakima*, 502 U.S. at 264.

The Court also stated: "In other words, the [Burke Act] proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.* at 264. The Supreme Court viewed the Burke Act Proviso as an acknowledgment and reaffirmation of the alienability and taxability of the land. It is § 5 of the GAA which the Supreme Court relied on in finding GAA land taxable. Section 5 was part of the GAA as originally enacted in 1887 and thus was inarguably incorporated into § 3 of the Nelson Act. Accordingly, the thirteen land parcels originally patented under § 3 of the GAA are taxable.

The seven parcels originally sold under the pine land sale provisions (§§ 4 and 5 Nelson Act) and the one parcel originally sold pursuant to the homestead sales provision (§ 6 Nelson Act) would not be taxable, however, under this alternative holding. Although both pine land and homestead sales were provided for in the Nelson Act, they did not incorporate the GAA. Only § 3 of the Nelson Act incorporated the terms of the GAA.



## III. CONCLUSION

In summary, the Court holds that, under *Yakima*, because all of the land at issue in this case is alienable, Cass County may assess and collect taxes on the § 3 land, pine land sale land, and homestead sale land. Because the land is taxable, Cass County has rightfully levied property taxes on the land since 1993 and may lawfully continue to levy property taxes on the land at issue.

Accordingly, upon review of the files, motions, and proceedings herein,

**IT IS ORDERED** that Plaintiff's motion for summary judgment is **DENIED.**

**IT IS FURTHER ORDERED** that the Clerk enter judgment as follows: **IT IS ORDERED ADJUDGED** and **DECREED** that this action is **DISMISSED.**

DATED: December 5, 1995.

/s/ Donald D. Alsop
DONALD D. ALSOP,
Senior Judge
United States
District Court

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 95-4263MND

| | | |
|---|---|---|
| Leech Lake Band of Chippewa Indians.<br><br>Appellant,<br><br>vs.<br><br>Cass County, Minnesota, et al.,<br><br>Appellees. | * | Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc |

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 9, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

---



**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**FIFTH DIVISION**

---

Leech Lake Band of Chippewa Indians,

Plaintiff,

v.

Cass County, Minnesota and, in their official capacities, Sharon K. Anderson, Cass County Auditor; Marge L. Daniels, Cass County Treasurer; and Steve Kuha, Cass County Assessor; Kenneth Johnson, James Demgen, Robert Blair, Erwin Ostlund, and Virgil Foster, Cass County Commissioners,

Defendants.

Civil. No. _____

**COMPLAINT**

---

The plaintiff, for its cause of action against the above-named defendants, alleges as follows:

**NATURE OF THE COMPLAINT**

1. this is a civil action for declaratory, injunctive, and monetary relief, brought by the Leech Lake Band of Chippewa Indians (hereafter, "Band") to protect Band-owned property from being subjected to Cass County ad valorem property taxes (hereafter, "property taxes"). It seeks an injunction preventing future taxation, a return of

past taxes paid by the Band under protest, and attorney fees and costs associated with the bringing of this action.

## JURISDICTION

2. This action arises under the laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1362; 28 U.S.C. § 1331; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 25 U.S.C. § 177; 28 U.S.C. § 1343; and 42 U.S.C. § 1983. This action is brought by an Indian tribe to protect its rights under United States law as interpreted by the Supreme Court to be free from state and local governmental taxation, and to protect the civil rights of its enrolled members to be governed by their elected government free from unlawful interference by a state or local government. The action involves an actual controversy requiring federal judicial relief.

## VENUE

3. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(b) because the causes of action alleged herein arose in the District of Minnesota, and because the defendants reside in the District of Minnesota.

## PARTIES

4. Plaintiff Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe possessing powers of self-government over its members and its territory.

5. Defendant Sharon K. Anderson, Cass County Auditor, is the officer responsible for the accounting of



county property tax levies and receipts, and is responsible for acting on delinquent tax levies.

6. Defendant Marge L. Daniels, Cass County Treasurer, is the officer responsible for the collection of property taxes levied on taxable property within Cass County, Minnesota.

7. Defendant Steve Kuha, Cass County Assessor, is the officer responsible for the valuation assessment and levy of property taxes on taxable property within Cass County Minnesota.

8. Defendants Kenneth Johnson, James Demgen, Robert Blair, Erwin Ostlund, and Virgil Foster, Cass County Commissioners, are responsible for the overall administration of county laws and programs, including the laws and programs involved in this lawsuit.

## STATEMENT OF THE CASE

9. The Band is located on and exercises sovereign governmental authority over a federally recognized reservation located in part in Cass County, Minnesota ("the Reservation"). The Reservation was initially created pursuant to the treaty of February 22, 1855, although the Reservation's boundaries were adjusted by various later treaties and executive orders. The history of the Reservation is further described in *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D. Minn. 1971).

10. The Band in its governmental capacity owns or has owned the following land parcels in Cass County (hereafter, collectively referred to as "the Properties") in

fee simple, free of any trust ownership on the part of the United States:

A. Portion of SW¼SE¼, Sec. 1, T.141N, R.31 W.

B. Lot 6, Block 10, Original Plat Cass Lake City, Sec.15, T.145N, R.31W.

C. Lots 7 & 8, Block 10, Original Plat Cass City, Sec.15, T.145N, R.31W.

D. Lots 21, 22, 22, & 24, Block 11, Original Plat Cass Lake City, Sec.14, T.145N, R.31W.

E. Gov't Lot 3, Sec.20, T.144N, R.28W.

F. Gov't Lot 4, Sec.20, T.144N, R.28W.

G. NW¼NE¼, Sec.21, T.144N, R.28W.

H. SW¼NE¼, Sec.21, T.144N, R.28W.

I. SW¼NW¼, Sec.21, T.144N, R.28W.

J. SE¼NW¼, Sec.21, T.144N, R.28W.

K. NW¼SW¼, Sec.21, T.144N, R.28W.

L. NW¼SE¼ less RY R/W, Sec.21, T.144N, R.28W.

M. NE¼SW¼, Sec.21, T.144N, R.28W.

N. Lot 28, Auditor's Plat #1, of Cass Lake City, Sec.15, T.145N, R.31W.

O. Lots 26 & 27, Auditor's Plat #1, of Cass Lake City, Sec.15, T.145N, R.31W.

P. North 86 feet of Lot 1, North 86 feet of Lot 2, Lots 3, 4, & 5, Block 16, Original Plat of Cass Lake City, Sec.15, T.145N, R.31W.

Q. Lots 10, 11, & 12, Block 11, Original Plat of Cass Lake City, Sec.15, T.145N, R.31W.



R. SE¼NE¼SE¼, Sec.9, T.145N, R.31W.

S. W½ Gov't. Lot 7, Sec.6, T.141N, R.30W.

T. Portion of SE¼SW¼, Sec.21, T.145N, R.31W.

U. Portion of E½SW¼SE¼, Sec.1, T.141N, R.31W.

11. The Properties are located within the boundaries of the Leech Lake Reservation, and are within Indian Country as defined by federal law.

12. The Band acquired the Properties by deed from private owners.

13. Cass County imposes property taxes on taxable real property located within the County.

14. Prior to 1993, Cass County did not as a matter of policy list property owned in fee by the Band as being subject to property taxes, and did not assess, levy, or collect property taxes thereon; except that the County did assess property taxes prior to 1993 against the parcels described in paragraph 10 above as "E" through "M".

15. On or about 1993, Cass County officials began to assess property taxes against the Properties owned in fee by the Band.

16. To date, the Band has paid property taxes, interest, and penalties under protest to Cass County in excess of $64,000.00 on the Properties.

17. The Band paid the taxes referred to in paragraph 16 solely in order to avoid state court forfeiture proceedings, and in no way did the Band ever assent to the

jurisdiction of Cass County to impose property taxes on the Properties.

18. Since the imposition of property taxes on the Properties by Cass County, and the payment under protest by the Band of such taxes, the Band has transferred certain parcels to the United States to hold in trust. Such parcels are listed in paragraph 10 as A., B., C., D., N., P., Q., R., S., T., and U.

19. Indian Tribes are immune from taxation by states or political subdivisions of states unless Congress has specifically delegated such authority to the states or their political subdivisions.

20. There is no federal statute or other Congressional action which has granted jurisdiction to Cass County to impose property taxes against the Properties.

21. The imposition by the Defendants of property taxes against the Properties exceeds the State's power to tax as prescribed in Article X, Section 1 of the Constitution of the State of Minnesota as adopted on October 13, 1857, and amended and restructured on November 5, 1974.

22. The imposition by the Defendants of property taxes against the Properties violates Minnesota Statutes § 272.01, subds. 1 and 3.

23. The imposition by the Defendants of property taxes against the Properties has caused substantial and continuing harm to the Band by diverting needed governmental resources, reducing the Band's ability to re-establish its land base, and by limiting the ways which the Band can purchase and use land.



24. The imposition by the Defendants of property taxes against the Properties will cause the Band substantial harm in the future.

25. The imposition by the Defendants of property taxes against the Properties constitutes an unauthorized infringement on the federally recognized sovereignty of the Band.

26. The imposition by the Defendants of property taxes against the Properties constitutes a violation of the civil rights of the enrolled members of the Band.

27. The Band has demanded that the Defendants remove the Properties from its tax rolls, and refund to the Band all taxes, interest, and penalties paid by the Band, under protest, on the Properties.

28. The Defendants have refused the demand of the Band described in paragraph 27.

29. The Band has no adequate remedy at law for the actions of Defendants.

**PRAYER FOR RELIEF**

WHEREFORE, the Band respectfully prays for the following relief:

1. An Order declaring that the Properties described in paragraph 10 are not subject to property taxes imposed by Cass County.

2. An Order directing Defendants to remove the Properties from the Cass County list of properties subject to property taxes.

3. An Order preliminarily and permanently enjoining Defendants or their successors in office from taking any action to assess, levy, or collect property taxes with regard to the Properties, or with regard to any land which may in the future be acquired or held in fee by the Band within the Reservation.

4. An Order awarding the Band a refund of all property taxes, interest, and penalties paid by it to Cass County with regard to the Properties, with both prejudgment and postjudgment interest.

5. An Order awarding the Band all its attorneys fees and costs associated with bringing the present action.

6. An Order granting any further relief as the Court may deem appropriate and just under the circumstances.

Dated: June 2, 1995

JACOBSON, BUFFALO, SCHOESSLER & MAGNUSON, LTD.

/s/ James M. Schoessler
By: James M. Schoessler
Atty. Regis. No. 97433
Steven G. Thorne
Atty. Regis. No. 109605
Joseph F. Halloran
Atty. Regis. No. 244132
810 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 339-2071

ATTORNEYS FOR THE LEECH LAKE BAND OF CHIPPEWA INDIANS

---



**General Allotment Act of 1887, 24 Stat. 388, § 5 (in pertinent part) and § 6.**

* * *

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

* * *

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law

or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians thereto, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * *

---



**Nelson Act of 1889, 25 Stat. 642, §§ 3, 5 and 6.**

* * *

SEC. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

* * *

SEC. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston. Minnesota; Chicago, Illinois; Milwaukee. Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston. Massachusetts, of the sale of said lands at public auction to the highest bidder for each at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act, nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead



law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

* * *

---

**General Allotment Act, § 6, as amended by The Burke Act of 1906, 25 U.S.C. § 349 (in pertinent part).**

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.

* * *